

**UNITED STATES DEPARTMENT OF LABOR
BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K STREET, N.W., SUITE 400-N
WASHINGTON, D.C. 20001-8002**

Date: February 12, 1998

Case No.: 97-INA-468

In the Matter of:

Ida Engevik
Employer,

On Behalf of:

Rosalina Bohorquez-Pacheco
Alien.

BEFORE: Burke, Vittone,
Administrative Law Judges

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Alien Rosalina Bohorquez-Pacheco, ("Alien") filed by Employer Ida Engevik ("Employer") pursuant to Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act") and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor, San Francisco, California, denied the application and the Employer requested review pursuant to 20 C.F.R. § 656.26.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On March 3, 1995, Employer filed an application for labor certification to enable Alien to fill the position of Cook. (AF 130). The job duties for the position are:

Cook preparing a special low fat, low calorie, no cholesterol menu for health conscious family. Must be able to follow a strict regimen of preparing healthy, but appetizing foods.

Use and knowledge of standard cooking utensils, appliances and equipment. Must menu plan and prepare meals for business entertainment, which is done regularly at the home.

Id.

The requirements for the position are eight years of grade school and two years of experience in the job offered or two years of experience in the related occupation of restaurant cook. *Id.*

The CO issued a Notice of Findings (“NOF”) on March 6, 1996. (AF 124-128). The CO proposed to deny labor certification on the ground that Employer was in violation of 20 C.F.R. § 656.20 (c)(8) because a bona fide job opening did not exist. The corrective action required consisted of answering approximately eight lengthy questions regarding the duties of the Cook, the need for a restrictive diet, the schedules of the family, and the performance of other household duties such as childcare and cleaning. (AF 127-128). Accordingly, Employer was notified that it had until April 10, 1996, to rebut the findings or cure the defects noted. (AF 124).

In its rebuttal, dated April 1, 1996 (AF 96-123), Employer asserted that the position was a bona fide job opportunity and answered each of the questions listed in the NOF. (AF 96-100). Employer also provided copies of income tax returns and a prescription for her husband indicating the need for a restrictive diet. (AF 106-109).

The CO issued the Final Determination (“FD”) on April 26, 1996 (AF 94-95), denying certification because Employer failed to adequately address or cure the issues noted in the NOF.

On May 29, 1996, Employer requested reconsideration of the FD and included copies of her schedule for the past five months and information about her community. (AF 3-93). On December 30, 1996, the CO denied the request for reconsideration and forwarded the record to this Board of Alien Labor Certification Appeals (“BALCA”). On October 8, 1997, Employer filed a brief and Motion for Remand.

DISCUSSION

As a preliminary matter, the Board will not consider documentation submitted by Employer with the request for review or reconsideration. Our review is to be based on the record upon which the denial of labor certification was made, the request for review, and any statement of position or legal briefs. 20 C.F.R. § 656.27 (c). *See Sharp Screen Supply, Inc.*, 94-INA-214 (May 25, 1995); *ST Systems, Inc.*, 92-INA-279 (Sept. 2, 1993); *Schroeder Brothers Co.*, 91-INA-324 (Aug. 26, 1992).

Examination of the NOF and FD demonstrates that the CO’s reasons for denying certification were based on 20 C.F.R. § 656.20 (c) which requires that Employer establish that a bona fide job exists and that the position is truly open to U.S. workers. In the NOF, the CO

required Employer to establish that the position is a bona fide job opportunity and constitutes full-time employment. The CO then stated seven specific inquiries demanding information that the rebuttal must include, some of which lent themselves to very short answers.

The rebuttal data consisted of a five page letter from Employer which addressed each of the seven inquiries in order. Employer states that she and her husband have three children and that the family is active in sports, church, school, and work. Employer attached copies of the family's income tax return and a prescription for a low fat diet for her husband, and explained that due to her husband's increased income and need for a special diet, they decided to hire a cook. The cooking had previously been done by Employer, but she is not home four evenings a week nor does she enjoy cooking. Employer estimates that 105 meals will need to be prepared on a weekly basis including baked goods and fruit for breakfast, bag lunches, nightly dinners, and extra meals to be eaten on the weekends. Additionally, the Cook will prepare snacks; meals and snacks for the sports teams of the children; weekly snacks for one child's kindergarten class, Sunday School class, computer class, Youth Group, and handball group; and meals for entertaining friends and co-workers. The Cook will also be required to bake breakfast muffins, cookies, etc. and to assist in preparation of the weekly menu and shopping list. As Employer lives in a rural community, shopping will be done on Monday and Friday afternoons. The Cook will be responsible for taking care of the kitchen, but will have no other duties.

The FD contains no explanation of the CO's problem with Employer's response to the seven specific inquiries. The FD only states, "While your letter, dated March 21, 1996, appears to address each issue cited in the Notice of Findings, it does not adequately address or cure the issues pursuant to guidelines provided in 'CORRECTIVE ACTIONS' of the Notice of Findings." (AF 95).

Upon reviewing Employer's rebuttal, we find that the evidence Employer offered in response to the NOF is sufficient to demonstrate that a permanent, full-time position exists for a cook who will prepare the special dietary meals Employer and her family require throughout the week and weekends. Employer documented that her husband has a medical condition which requires a special diet and that the family's income has increased in recent years enabling them to afford a cook. *See Bartosz Strojeck*, 95-INA-633 (May 30, 1997); *Gregory G. Khaklos*, 94-INA-50 (Nov. 16, 1994). Furthermore, Employer's assertions are reasonably specific and are to be considered documentation which must be given the weight they rationally deserve. *Gencorp*, 87-INA-659 (Jan. 13, 1988) (*en banc*). The combination of Employer's documentation and her credible assertions leads to the conclusion that Employer has established the existence of a bona fide job opportunity.

ORDER

Accordingly, the Certifying Officer's denial of labor certification is hereby **REVERSED**, and the Certifying Officer is directed to **GRANT** certification.

SO ORDERED.

Entered at the direction of the Panel:

TODD R. SMYTH
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.